No. 83-128

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA,

Petitioner,

—v.—

WILLIAM GOUVEIA, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION AS *AMICUS CURIAE*

IN SUPPORT OF AFFIRMANCE

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Brief of the American Civil Liberties Union Foundation As Amicus Curiae

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INTEREST OF AMICUS CURIAE

The American Civil Liberties Union is a nationwide, non-partisan organization of over 250,000 members, dedicated to preserving and defending the fundamental liberties guaranteed by the Bill of Rights. Since its representation of

the Scottsboro defendants in Powell v. Alabama, 287 U.S. 45 (1932), the case which established the modern shape of the Sixth Amendment right to counsel, the ACLU has participated in numerous cases where zealous governmental officials have attempted to secure prosecutions without affording the effective and timely counsel the Constitution guarantees.

This case raises a question concerning the scope of the right to counsel in a situation of prolonged detention where the procedural rules which ordinarily suffice to guarantee counsel necessary for the defense of a criminal case do not appear to apply. We file this brief amicus curiae to demonstrate the analytical failings of the Solicitor General's proposed constricted view of the right to counsel which would, if accepted, severely diminish the protection the Sixth Amendment guarantees.

Statement of the Case

This case raises the question of whether the Sixth Amendment right to counsel is triggered by an arrest and prolonged detention, or whether, as the Solicitor General contends, the government may indefinitely suspend an accused's constitutional right to counsel upon arrest and significant detention by simply delaying the initiation of formal judicial adversarial proceedings.

Respondents, all inmates at the Federal Correctional Institution at Lompoc, California, were detained in administrative segregation after the commission of crimes within the prison. Respondents continued to be confined in administrative custody for more than 19 months, in the case of four respondents, and eight months in the case of two others. Their confinement was maintained pursuant to

regulations authorizing the indefinite segregation of inmates who are subjects of a pending criminal investigation. See 28 C.F.R. § 541.22(a)(3) & (6)(i).

During their isolation in administrative custody, respondents were housed in three-by-five-foot cells. Their confinement was alleviated only by a short daily exercise period and scheduled visitation sessions. Although respondents were allowed access to legal materials and were permitted to make unmonitored telephone calls, they were effectively prohibited from any contact with the general prison population.

Despite the extraordinary length of their detention in solitary confinement pending investigation, government counsel in the case of respondents Mills and Pierce admitted in the district court that the authorities had obtained sufficient evidence to arraign respondents at the

time that they were originally placed in administrative detention, eight months prior to their indictment. Counsel further conceded that had respondents been at large on the evening of the murder, the government would have promptly arrested them, taken them before a magistrate and provided them with lawyers. JA 171. Pet. 46a.*

The United States Court of Appeals for the Ninth Circuit consolidated respondents' appeals from their respective convictions for en banc consideration of whether a federal prisoner suspected of committing a crime while in prison and placed in administrative detention is constitutionally entitled to an attorney prior to indictment. Answering that ques-

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* JA refers to the Joint Appendix; Pet. signifies the Petition for a Writ of Certiorari.

tion in the affirmative, the court held that the Sixth Amendment requires that a federal inmate suspected of a crime and held in administrative detention beyond the period necessary to ensure security of the prison is entitled to appointment of counsel upon his showing that his continued detention is primarily due to the ongoing criminal investigation.

The court based its decision on the conclusion that for purposes of the Sixth Amendment prolonged administrative detention under these circumstances is tantamount to an arrest and accusation. Because such restraints inevitably hinder the preparation of a defense, the court reasoned that prompt appointment of counsel is necessary to ensure a fair trial.

Summary of Argument

A. This Court has not had occasion to define the scope of the Sixth Amendment right to counsel in a case involving prolonged, pre-charge detention because the rules of criminal procedure normally are sufficient to assure the prompt appointment of counsel in such circumstances. This case, because it arises in a prison setting where the customary procedural rules are inapplicable, illustrates the need for clarification that prolonged detention after arrest triggers a constitutional right to counsel.

The Solicitor General contends that, as a matter of constitution doctrine, the government may indefinitely suspend the Sixth Amendment right to counsel after a suspect has been arrested and detained by merely delaying indictment or arraignment. That interpretation is wholly at odds with the constitutional

framework of our criminal justice system and is not supported by this Court's precedent.

Government-imposed detention in advance of formal charges serves to burden the ability of the accused to mount a defense; the interference posed by the government's conduct on the accused's ability to investigate triggers the right to counsel.

The rule contended for here would be novel only in its explicit statement. It would have little effect upon the existing criminal justice system since procedural rules in every jurisdiction normally require the rapid appointment of counsel for a detainee. Moreover, the rule also fully comports with existing constitutional doctrine reflecting the significance of government restraints under the Sixth Amendment.

B. Like an arrest and significant detention, confinement of an inmate in administrative detention pending a criminal investigation triggers the Sixth Amendment right to counsel. Segregation of an inmate from the general population beyond the period specified for disciplinary purposes because he is the subject of a criminal investigation bears the clear indicia of an accusation. Not only is the inmate deprived of that limited liberty which he retains within the prison environment, but the government utilizes that restriction to benefit its own criminal investigation.

C. The Fifth Amendment also requires that the indictments against respondents be dismissed because the government's pre-indictment conduct deprived respondents of due process of law. Here, the government affirmatively placed obstacles in the way of respondents' ability to

prepare their defense, manipulating the timing of their indictments to gain tactical advantage over respondents at trial. For up to twenty months after the commission of the crimes with which they were ultimately charged, respondents were confined in administrative detention pursuant to regulations which purport to authorize indefinite confinement for "pre-trial inmates". The legitimate institutional interests served by isolation of suspect-inmates provides no justification for the pre-indictment delay; the effect of the extended period of pre-indictment administrative detention was to render respondents powerless to preserve evidence in their favor and to prepare their defense.

D. Respondents' proof of prejudice is sufficient under both the Fifth and Sixth Amendment standards to justify dismissal of the indictments against them. The applicable standard of showing preju-

dice here is the "relaxed requirement" of United States v. Valenzuela-Bernal, 458 U.S. 858 (1982).

Because the government by its unilateral action deprived respondents of the opportunity to interview witnesses and to preserve material evidence, respondents are required, under the Valenzuela-Bernal standard of proof of prejudice, to make only a plausible showing that the pre-indictment delay had deprived them of witnesses' testimony that would have been material and favorable to their defense. The district court's characterization of the prejudice respondents suffered is based on specific findings of fact which demonstrate that respondents' proof met this "plausible showing" standard. Having carried their burden under the Fifth Amendment, the traditionally less stringent requirement of proof of prejudice under the Sixth Amendment was also met.

Argument

I. THE SIXTH AMENDMENT REQUIRES THAT COUNSEL BE APPOINTED FOR AN INDIGENT PRISON INMATE HELD IN EXTENDED SOLITARY CONFINEMENT PENDING A CRIMINAL INVESTIGATION AGAINST HIM.

Where, as here, the government essentially arrests and detains a suspect for a significant period of time pending criminal investigation, that suspect has a right under the Sixth Amendment to the assistance of counsel. This right, although implicit in our system of criminal justice, has never been expressed in constitutional terms for the simple reason that procedural rules normally have sufficed to protect the right of a detained suspect to the speedy appointment of counsel. Because this case arises in a context where those procedures are inapplicable, it vividly demonstrates the need

for clarification of the Sixth Amendment right.

Amicus rejects the argument of the Solicitor General that, apart from the current rules of criminal procedure, no constitutional limit prevents the government from indefinitely suspending the right of a detained suspect to counsel by simply delaying indictment or arraignment. To the contrary, both the fundamental purpose of the Sixth Amendment and this Court's construction of it amply support amicus' contention that respondents were unconstitutionally denied their right to counsel during the long periods they were held in solitary confinement because of the pending criminal investigations against them.

A. The Sixth Amendment Right To Counsel Attaches When Government Authorities Accuse A Suspect By Arrest And Significant Detention.

The Sixth Amendment provides that an accused shall enjoy the right "to have the Assistance of Counsel for his defence." This right, fundamental to our system of justice, is meant to assure fairness in the adversary criminal process. Gideon v. Wainwright, 372 U.S. 335, 344 (1963); Glasser v. United States, 315 U.S. 60, 69-70, 75-76 (1942); Johnson v. Zerbst, 304 U.S. 458, 462-63 (1938). This Court has frequently considered the varying circumstances under which the right to counsel attaches. See, e.g., United States v. Ash, 413 U.S. 300 (1973); Kirby v. Illnois, 406 U.S. 682 (1972); United States v. Wade, 388 U.S. 218 (1967).

As a practical matter, however, this Court has never had occasion to de-

fine the scope of the right to counsel guarantee in a case involving prolonged detention in the absence of counsel, because the rules of criminal procedure have for decades prevented such a situation. For example, in federal prosecutions, Rules 5(a) and 44(a), Fed. R. Crim. P., require that a suspect who is arrested and detained be arraigned "without unnecessary delay" and that counsel be appointed before or at the arraignment. See also Powell v. Alabama, 287 U.S. 45, 57 (1932). Accordingly, as this Court is well aware, the typical criminal case involves either brief detention folowing arrest, without necessity of appointment of counsel, or continued custody after arrest triggering a speedy arraignment and appointment of counsel pursuant to existing rules. Rules 5(a), 44(a), Fed. R. Crim. P.

In the prison context, however, the safeguards offered by the rules of

criminal procedure are unavailable. But see Smith v. United States, 409 U.S. 1066 (1972) (Douglas, J.) (dissent from denial of petition for certiorari) (suggesting applicability of Rule 5, Fed. R. Crim. P., to prison setting). This case, because of its prison setting, raises the serious yet easily bridged gap between the largely-unlitigated constitutional and the universally-recognized, rule-created right to counsel upon arrest and prolonged detention.

In light of the absence of an explicit constitutional mandate in the case law, the Solicitor General takes the position that arrest and prolonged detention have no significance under the Sixth Amendment. Implicit in the Solicitor General's position is a constitutional license for the government to restrain persons accused or suspected of crimes for indefinite periods without triggering the

right to counsel, a situation which would leave detainees stranded in jail with no assistance whatsoever. This Orwellian interpretation of the Sixth Amendment must be rejected as wholly at odds with traditional constitutional doctrine and fundamental notions of the criminal justice system in America. Accordingly, amicus urges the Court to clarify and make explicit the constitutional requirement of appointment of counsel upon the arrest and significant detention of a suspect.

The Solicitor General errs in relying on Kirby v. Illinois, 406 U.S. 682 (1972) (plurality opinion), for the remarkable proposition of Sixth Amendment law he urges this Court to adopt. In essence, the Solicitor General contends that so long as a non-adversarial determination of probable cause has been made, thereby satisfying the Fourth Amendment concerns at issue in Gerstein v. Pugh, 420 U.S. 103

(1975), the detained person may be left to languish in jail for years without benefit of counsel, unless and until formal judicial adversary proceedings are commenced, finally triggering a right to counsel under Kirby.

Kirby does not control this case. The Court in Kirby was confronted with the entirely different question of whether the Sixth Amendment requires a per se rule excluding from evidence at trial the fruits of an uncounselled out-of-court lineup conducted after an arrest but prior to indictment. In determining that no such per se exclusionary rule was constitutionally compelled by the facts presented in Kirby, the Court said nothing that properly illumines the question of whether prolonged detention after arrest may trigger a right to counsel in circumstances where the absence of counsel may forever preclude an effective defense.

Moreover, although the significance afforded by the plurality opinion in Kirby to the onset of "adversary judicial proceedings" in triggering a right to counsel has been followed in other cases, the central fact remains that the Kirby Court did not set out an absolute litmus test. Instead, the Kirby "adversarial proceeding" notion is a shorthand formula for the Sixth Amendment's fundamental underlying purpose: the right to counsel attaches whenever necessary "for [the] defence" of an accused. United States v. Ash, 413 U.S. at 306. Those occasions when the right to counsel is necessary are labeled "critical;" in determining whether such assistance is necessary at any given time, the Court has found the adversarial nature of the proceeding to be a relevant, but not controlling, factor. See id. at 316-17.

For example, the Court has ruled that even after the commencement of formal proceedings a criminal defendant has no right to counsel at a photographic display because the display is not a "critical stage" in the prosecution. Id. at 321. On the other hand, a defendant in custody has an absolute right to have counsel present at post-arrest interrogations, even though those interrogations take place before actual judicial proceedings are begun. See Miranda v. Arizona, 384 U.S. 436, 470-71 (1966) (addressing Fifth Amendment privilege against self-incrimination but relied upon in United States v. Wade, 388 U.S. 218 (1967), for Sixth Amendment analysis).

In contrast to the Solicitor General's reading of the Sixth Amendment, the rule contended for here would be novel only in its explicit statement. In practical terms, recognition that the Consti-

tution guarantees the right to counsel after a significant period of detention would not alter the day-to-day workings of the criminal justice system, since procedural rules in every jurisdiction normally dictate the rapid appointment of an attorney. It would only be in the unusual case, such as the instant one, that the constitutional protection would necessarily be invoked.

Moreover, the standard proposed here fully comports with existing constitutional doctrine. Indeed, this interpretation of the Sixth Amendment right to counsel finds direct support in this Court's construction of the speedy trial guarantee found in the same amendment. The Court has termed the Sixth Amendment speedy trial provision "'an important safeguard to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public

accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself.'" United States v. Marion, 404 U.S. 307, 322 (1971), citing United States v. Ewell, 383 U.S. 116, 120 (1966). Thus, in United States v. Marion, this Court made clear that invocation of the Sixth Amendment for speedy trial purposes need not await indictment, information or other formal charge. 404 U.S. at 321. Rather, the Court emphasized that "the actual restraints imposed by arrest and holding to answer a criminal charge" suffice to render one "accused," thus triggering the constitutional protection of a speedy trial. Id. at 320. See also Dillingham v. United States, 423 U.S. 64, 65 (1975) ("the Government constitute[s] petitioner an 'accused' when it arrest[s] him and thereby commence[s] its prosecution of him").

Like the speedy trial provision, the purposes of the Sixth Amendment right to counsel guarantee require that the right attach when "actual restraints" are imposed upon a suspect's liberty for any significant period. As explained by this Court, the right to counsel provision seeks to ensure that an accused receives assistance at every critical stage of the proceedings against him, United States v. Ash, 413 U.S. at 307-08, and to minimize the imbalance in the adversary system created by the establishment of a public prosecutor. Id. at 309.*

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* At least one lower federal court has recognized this application of the Sixth Amendment right to counsel. In United States ex rel. Burton v. Cuyler, 439 F. Supp. 1173 (E.D. Pa. 1977), aff'd without opinion, 582 F.2d 1278 (3d Cir. 1978), the court was confronted with the application of Kirby where the defendant "is under arrest or is somehow restrained of his liberty but has not been indicted or arraigned or had a prelimi-

(Footnote continued)

A prolonged period of pre-trial detention clearly constitutes a "critical

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nary hearing." Id. at 1179.

In Cuyler, the Court ultimately decided that under Pennsylvania law the issuance of an arrest warrant had commenced the "adversary proceedings" against the petitioner even though the warrant was not served until after the uncounselled lineup, conducted while the defendant was in custody on charges unrelated to the case. Id. at 1181. The Court was persuaded that the true reason for holding the lineup was merely to enhance the prosecution's evidence rather than to investigate and that as of the date of the lineup the state had committed itself to prosecute, albeit informally. Id. In an analysis directly applicable to this case, the court noted:

> Given the facts of this case, we need not decide whether the issuance of a warrant for arrest is sufficient in itself as a matter of federal law to trigger relator's right to counsel. We do not believe, however, that by simply delaying the occurrence of an arraignment or preliminary hearing (as was done in this case, presumably because relator was in custody on another charge) the state can in effect suspend the right to counsel

(Footnote continued)

period" in the preparation of a defense. Confinement during this time in the absence of counsel impairs the accused's ability to confer with potential defense witnesses or even to keep track of their whereabouts. See Smith v. Hooey, 393 U.S. 374, 379-80 (1969) (discussing right to speedy trial). And, although evidence and witnesses can disappear during the course of any criminal proceeding, "a man isolated in prison is powerless to exert his own investigative efforts to mitigate those erosive effects of the passage of time." Id. at 380.

Moreover, in the case of prolonged pre-charge detention imposed exclusively because of the pendency of the gov-

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until it has neatly tied its case together and obtained, unmonitored, the desired lineup identifications.

Id. at 1181-82.

ernment's criminal investigation, it is the government that is imposing obstacles to the preparation of a defense, a factor which significantly alters the government's responsibility under the Sixth Amendment. Not only is such a period "critical" to the preservation of evidence, but the right to counsel is absolutely necessary to counter the imbalance created by the government's ability to restrain the suspect while it completes its case.

This Court has long recognized that one of the fundamental aspects of the right to counsel is the attorney's assistance before trial in investigating the case and preparing a defense. Thus, where counsel is not appointed during the "critical period . . . when consultation, thoroughgoing investigation and preparation [are] initially important," subsequent appointment of counsel will not cure

the original deprivation. Powell v. Alabama, 287 U.S. at 57. Nonetheless, in the instant case the Solicitor General seeks to justify the belated appointment of counsel on the ground that a target held in solitary confinement during investigation is no more prejudiced by the appointment of counsel at indictment than is a target who suffers no restraints during the investigatory period.

This position is erroneous for two reasons. First, it assumes investigative abilities on the part of administrative detainees that defy common sense. Second, it focuses on whether or not a target will normally prepare a defense in advance of formal charges rather than on the real question at issue: whether the government may burden the freedom to do so by detaining the target, or as in the instant case, placing him in solitary confinement, without assistance of counsel.

As a practical matter, the procedures by which a segregated inmate purportedly may, according to the Solicitor General, gain and preserve evidence during a lengthy period of pre-charge solitary confinement are unworkable. Although theoretically an inmate could, as suggested by the Solicitor General, create his record by interviews with the FBI, he would waive his privilege against self-incrimination in the process. Equally unfeasible is the possibility that an inmate would place his trust in a member of the prison staff to help him organize his case or that other inmates would offer much assistance to that staff member in light of the apparent conflict of interest. See, e.g., Hooks v. Wainwright, 536 F. Supp. 1330, 1348 (N.D. Fla. 1982) (noting inherent conflict of interest of prison staff members employed to provide legal assistance to inmates against prison

administration). Finally, the ludicrous suggestion in the Solicitor General's brief, at page 39, that administrative detainees can pursue their own investigations by speaking through conduits, air vents and windows betrays the utter lack of merit in the government's position here.

It is thus obvious that administrative detainees, left to their own devices, do not have the means to gather and preserve evidence. Indeed, since effective segregation from other prison inmates and personnel is exactly what the detention is intended to ensure, it ill behooves the Solicitor General to rely on a contention that such segregation may on occasion be unsuccessful in attaining its goals. Cf. Smith v. Hooey, 393 U.S. at 378 (discussing inability of inmate in general population to investigate).

Equally misplaced is the Solicitor General's argument that neither general population inmates nor non-inmate targets have unlimited abilities to pursue investigations. That contention overlooks the critical distinction that in this case, or any case of pre-trial detention that is imposed only by virtue of a pending investigation of charges not yet brought, the government is affirmatively burdening the suspect's ability to investigate and mount a defense.

As this Court has pointed out in other contexts, although the government normally has no obligation affirmatively to provide for the exercise of a right, it may not affirmatively obstruct that right. For example, in United States v. Valenzuela-Bernal, 458 U.S. 858 (1982), the Court recognized that deportation by the government of a material, favorable witness for the defense can establish a

violation of the compulsory process clause of the Sixth Amendment. Id. at 873.

The Court has articulated this same principle in a recent line of cases dealing with abortion. It has concluded that although the government is not obligated to pay for the exercise of a woman's right to an abortion, it may not affirmatively block her access to that right by restrictive regulation. Compare Harris v. McRae, 448 U.S. 297, 315-17 (1980) (federal funding regulation which by unequal subsidization of abortion and other medical services encourages alternatives to abortion passes constitutional scrutiny because government has placed no barrier to exercise of right to abortion) and Maher v. Roe, 432 U.S. 464, 471-74 (1977) (Connecticut funding regulation favoring childbirth over abortion by means of unequal subsidization does not impinge on constitutional freedom to abortion because

it imposes no government restriction on access to abortion) with City of Akron v. Akron Center for Reproductive Health, _____ U.S. _____ (1983) (striking down as unconstitutional municipal ordinance regulating various aspects of the performance of abortions as unreasonable infringement on woman's constitutional right to obtain abortion). Thus, it is the fact of government restraint on a right, rather than a particular individual's capacity to exercise it, that becomes the focus of constitutional inquiry.

In the present case, it is the government's imposition of obstacles to respondents' ability to investigate and prepare a defense that gives rise to a right of counsel. Even though the passage of time will cause evidence to disappear and memories to fade in any criminal case, here the fact of government-imposed custody prevented respondents from attempting

to mitigate those losses. See Smith v. Hooey, 393 U.S. at 380. Because of this government restraint, respondents' claim of an impaired defense cannot, under the Sixth Amendment, be equated with that of a suspect who is free of confinement. Accordingly, the Sixth Amendment must be read to guarantee a right to counsel in advance of formal judicial adversary proceedings where lengthy pre-trial detention impairs the ability of the accused to prepare his defense.

B. Confinement Of An Inmate In Segregated Custody Pending A Criminal Investigation, Like An Arrest And Detention, Triggers The Right To Counsel.

In considering respondents' claims that they were unconstitutionally denied access to counsel, the court of appeals correctly found that prolonged administrative detention can serve an accusatory function, at which point the right to counsel attaches. Central to the

court's holding, but remarkably distorted by the Solicitor General, is the condition that the prisoner be held because of an impending investigation and indictment related to a serious crime. United States v. Gouveia, 704 F.2d 1116, 1124 (1983).

By so holding, the court carefully distinguished between administrative segregations used for internal prison purposes and those utilized only because the government is preparing new charges against the inmate. Id. Importantly, even where counsel must be appointed, the court's holding in no way threatens the use of administrative detention for either purpose.

Segregation of an inmate from the general population beyond the period

specified for disciplinary purposes* because he is the subject of a criminal investigation bears the unmistakable indicia of an accusation. The government not only points its finger at him as the target of an inquiry but actually brings its forces to bear on him by prolonged detention during that investigation. Indeed, although prison inmates clearly have much diminished liberty interests, see Hewitt v. Helms, _____ U.S. _____, 103 S. Ct. 864 (1983), the additional restraints imposed by solitary confinement are directly analogous to the arrest and detention of an

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* The Solicitor General suggests that the court of appeals erred in calculating the permissible period of administrative detention as 90 rather than 150 days. Although we question the Solicitor General's reading of the regulations, the more important point is that even applying the 150 day rule, the government still maintained respondents in isolation without counsel for an additional three to fourteen months.

ordinary citizen. As this Court explained in Smith v. Hooey:

> At first blush it might appear that a man already in prison under a lawful sentence is hardly in a position to suffer from 'undue and oppressive incarceration prior to trial.' But the fact is that delay in bringing such a person to trial on a pending charge may ultimately result in as much oppression as is suffered by one who is jailed without bail upon an untried charge.

393 U.S. at 378 (applying Sixth Amendment right to speedy trial). Cf. Hewitt v. Helms, ____ U.S. at ___, 103 S. Ct. at 875 (Stevens, J., dissenting) (transfer to solitary confinement from general prison population constitutes severe impairment of residuum of liberty which prisoner retains).

Like the arrest and detention of a suspect on the street, transfer to solitary confinement based on the belief that the inmate has committed a criminal act establishes the adversarial positions of

the parties. Since the police could not arrest and hold a non-inmate suspect indefinitely without the appointment of counsel, there is no rational basis for allowing the government to do so within prison walls. Cf. Mathis v. United States, 391 U.S. 1 (1968) (inmate entitled to be free of uncounselled custodial interrogation on separate offense); United States v. McLemore, 447 F. Supp. 1229 (E.D. Mich. 1978) (arrest followed by subsequent nine-month detention of escaped inmate before initiation of charges violated inmate's Sixth Amendment right to speedy trial; fact that inmate was not lawfully at large did not make interference with his liberty any less of an arrest).*

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* The Solicitor General argues that the arrest analogy based upon the Sixth Amendment right to a speedy trial fails because both arrest and holding

(Footnote continued)

Admittedly, administrative detention is a necessary fact of prison administration. As pointed out by the court of appeals, "[t]emporary isolation, imposed to defuse a potentially explosive confrontation and to protect inmates from harm, is part of the correctional process." 704 F.2d at 1121. But the prolonged detention involved here was not "temporary isolation" nor was it for the purpose of prison security. Despite the

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to answer a criminal charge are necessary to engage the speedy trial right. According to the Solicitor General, respondents were not "held to answer" a criminal charge until they were indicted, Pet. Brief 30, thus ignoring the period of up to 20 months that respondents were kept in isolated custody pending investigation and indictment. That the Court has already rejected such a lame position is not surprising. See Dillingham v. United States, 423 U.S. at 65 (22-month period of delay between arrest and indictment to be considered in Sixth Amendment claim for denial of speedy trial).

Solicitor General's transparent attempt to recast the facts in a more sympathetic light, both the court of appeals and the district court in the case of respondents Mills and Pierce, found that respondents were restrained because of the pending investigations. In light of these findings, the Solicitor General's efforts to rewrite the record are unavailing.* See

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* That respondents were retained in isolated custody for the purpose of criminal investigation as opposed to internal prison reasons provides the critical distinguishing point between this case and those cases cited by the Solicitor General for the proposition that segregation does not trigger the Sixth Amendment right to a speedy trial. See United States v. Mills, 704 F.2d 1553, 1556-57 (11th Cir. 1983) (disciplinary segregation); United States v. Daniels, 698 F.2d 221, 222 (4th Cir. 1983) (same); United States v. Bambulas, 571 F.2d 525, 527 (10th Cir. 1978) (speedy trial claim time-barred); United States v. Clardy, 540 F.2d 439, 441 (9th Cir. 1976) (disciplinary segregation); United States v. Duke, 527 F.2d 386, 389 (5th Cir.), cert. denied, 426 U.S. 952 (1976) (disciplin-

(Footnote continued)

Berenyi v. Immigration Director, 385 U.S. 630, 635 (1967) (Supreme Court will not review concurrent findings of fact by two courts in absence of exceptional showing of error).

To the contrary, detention of a suspect in solitary confinement pending investigation of a crime on the presumption that he will intimidate witnesses only furthers the conclusion that the government has adopted an adversarial position toward the suspect. By placing the inmate in solitary confinement pending a criminal investigation, the government manifests not only its intent to pursue

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ary segregation accompanying breach of prison regulation "in no way" related or dependant on federal prosecution). But see United States v. Blevins, 593 F.2d 646, 647 (5th Cir. 1979) (rejecting speedy trial claim by prisoner based on seven-month delay between confinement in administrative segregation pending investigation and indictment).

the inmate for the crime but also its assumption that the inmate would obstruct that pursuit. At this juncture, the adversarial nature of the confinement is apparent, thereby triggering the inmate's right to counsel. Assuming arguendo that the continued use of administrative detention pending investigation is necessary to facilitate the inquiry and ensure security, those purposes do not disengage the inmate-detainee's right to counsel.*

II. THE GOVERNMENT'S PRE-INDICTMENT DELAY DEPRIVED RESPONDENTS OF DUE PROCESS IN VIOLATION OF THE FIFTH AMENDMENT.

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* By analogy, post-arrest custodial interrogation of suspects often facilitates police investigation but its necessity does not do away with the suspect's right to counsel. Miranda v. Arizona, 384 U.S. at 470-71.

This case does not present the typical pre-indictment delay issue in which defendants contend that the mere passage of time between commission of the offense and indictment has prejudiced the preparation of a defense. Nor is this a case in which the government can in good faith contend that the delay was the result of an ongoing investigation. See JA 171; Pet. 46a. Rather, here, the government affirmatively placed obstacles in the way of the respondents' defense, using the time between the commission of the offense and the indictment "to gain tactical advantage over the accused." United States v. Marion, 404 U.S. 307, 324 (1971).

In this case, the government placed indigent prisoners in administrative detention for up to twenty months pursuant to regulations which purport to authorize open-ended detention of "pretrial inmates." 28 C.F.R. § 541.22(a)(3)

& (6)(i). Because these inmates did not have the means to retain counsel and because of the delayed indictment, the effect of administrative detention was to render these "pre-trial inmates" powerless to preserve evidence in their favor and to prepare their defense. This one-sided form of pre-indictment delay, in which the government justifies solitary confinement on the ground that an inmate is pending trial but prevents an indigent, "pre-trial inmate" from having the assistance of counsel by delaying indictment, cannot possibly comport with those "fundamental conceptions of justice which lie at the base of our civil and political institutions," [citation omitted], and which define "the community's sense of fair play and decency, [citation omitted]." United States v. Lovasco, 431 U.S. 783, 790 (1977).

Of course, as the Court has noted, "the isolation of a prisoner pending investigation of misconduct charges against him serves important institutional interests relating to the insulating of possible witnesses from coercion or harm." Hewitt v. Helms, ___ U.S. at ___, 103 S. Ct. at 872. The coercion or harm that pre-trial isolation is intended to prevent, however, is premised on the presumption, inherent in the regulations authorizing pre-trial detention, that a trial is to be held and that inmates with potentially adverse testimony to give at trial may be threatened by an inmate-defendant released into the general prison population. The legitimacy of isolation of the suspect-inmate cannot itself provide justification for the pre-indictment delay. Indeed, the Court has asserted that "administrative segregation may not be used as a pretext for indefinite confinement of

an inmate." Id. at ___, 103 S. Ct. at 874.

Moreover, given the transient nature of the prison population, the institutional interest in insulating potential witnesses from coercion or harm diminishes with the passage of time, as the inmate-witnesses are paroled or transferred to other institutions. Thereafter, no legitimate investigative purpose is conceivably served by continuing to hold the suspect in segregated confinement. As this institutional interest in the security of other inmates diminishes, therefore, the constitutional interests of avoiding pre-trial delay for "pre-trial inmates" must assume relatively greater importance. Whether or not the procedures under which inmates are indefinitely confined pending trial comport with due process, the government's unjustified delay in obtaining indictments against such

"pre-trial inmates" is an improper tactic which is inconsistent with the due process guarantee.

III. RESPONDENTS' PROOF OF PREJUDICE WAS SUFFICIENT TO JUSTIFY DISMISSAL OF THE INDICTMENTS AGAINST THEM.

A. The Showing Of Prejudice That Respondents Must Establish Is The "Relaxed Standard" Enunciated In United States v. Valenzuela-Bernal.

The degree of prejudice that must be demonstrated to support a due process claim under the Fifth Amendment and a claim of infringement of the right to counsel under the Sixth Amendment varies with the circumstances attending the claim. Although a showing of actual prejudice is frequently required for Fifth Amendment purposes, see United States v. Lovasco, 431 U.S. at 789-90, United States v. Marion, 404 U.S. at 324-26, the analy-

sis under the Sixth Amendment is more lenient.

The Court has long regarded "[t]he right to have assistance of counsel [as] too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." Glasser v. United States, 315 U.S. at 76. For this reason, the Court has often reversed convictions without an analysis of prejudice where the violations of the right to counsel posed obvious threats of serious harm. E.g., Holloway v. Arkansas, 435 U.S. 475 (1978); Herring v. New York, 422 U.S. 853 (1975); Gideon v. Wainwright, 372 U.S. 335 (1963); Powell v. Alabama, 287 U.S. 45 (1932). See United States v. Morrison, 449 U.S. 361, 365 (1981) (dismissal of indictment based on violation of right to counsel justified by showing of substantial threat of demonstrable prejudice).

The standard of proof of prejudice applicable to this case can be no greater than that recently enunciated by this Court in United States v. Valenzuela-Bernal, 458 U.S. 858 (1982). In that case, the Court expressly held, for both Fifth and Sixth Amendment purposes, that "a relaxation of the specificity required in showing materiality" is appropriate where, by virtue of the unilateral act of the government, neither the defendant nor his attorney has been afforded an opportunity to interview witnesses. Id. at 870 (emphasis supplied).

Such a relaxation is appropriate because "a defendant who has not had an opportunity to interview a witness may face a difficult task in making a showing of materiality." Id. at 871. Thus, although the Court has been unwilling to dispense wholly with the prejudice requirement, it has indicated that a showing

of "the events to which a witness might testify, and the relevance of those events to the crime charged, may well demonstrate either the presence or absence of the required materiality," id. at 871, and that "sanctions will be warranted . . . if there is a reasonable likelihood that the testimony could have affected the judgment of the trier of fact." Id. at 873-74.

The relaxed standard of the necessary showing of prejudice enunciated in Valenzuela-Bernal is directly applicable to this case. Indeed, the handicap imposed on respondents as a result of the extended period of pre-trial administrative detention imposed by the government and the government's unjustifiable pre-indictment delay were substantially greater than the circumstances confronting the defendant in Valenzuela-Bernal. In Valenzuela-Bernal the defendant, though deprived of an opportunity to interview

material witnesses whom the government had deported prior to trial, still was in a reasonable position to make a showing of the subjects on which such witnesses might testify at trial because of the particular facts of that case.*

Here, for up to 20 months prior to indictment respondents were deprived of any opportunity whatsoever even to identify, let alone interview, other prisoners who may have witnessed the crimes with which defendants were to be charged, to interview witnesses who could have cor-

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* The defendant in Valenzuela-Bernal was charged with transporting illegal aliens in an automobile of which he was the driver; the aliens were his passengers. 458 U.S. at 860. The Court noted that the defendant was accordingly in a position to know what his passengers - the deported illegal aliens - saw and said during the course of the automobile ride at issue. Id. at 871. As a result, the defendant was capable of making at least some showing concerning their likely testimony. Id.

roborated their alibis and to preserve physical evidence essential to corroborate their testimony and to rebut the evidence against them. In contrast to the defendant in Valenzuela-Bernal, respondents were consequently not in a position to make any concrete showing of who their missing witnesses were or what their testimony might be. Therefore, under the principles set forth in Valenzuela-Bernal, the standard of proof of prejudice to which respondents should if anything be held should be more lenient than that imposed upon the defendant in Valenzuela-Bernal.

B. Respondents Made A Plausible Showing That Their Prolonged Pre-Indictment Detention Without Counsel Deprived Them Of Witnesses' Testimony That Would Have Been Material And Favorable To Their Defense And Therefore Satisfied The Valenzuela-Bernal Prejudice Standard.

As the Ninth Circuit noted, the district court "found that [respondents]

had been irreparably prejudiced because of the dimming of memories of exonerating witnesses, the loss of witnesses, and the deterioration of physical evidence." 704 F.2d at 1119 (emphasis supplied). In reviewing the evidence of prejudice on appeal, the Ninth Circuit found that the district court accurately characterized the prejudices suffered.

> Specifically, defendants have been prejudiced by the dimming of memories of witnesses who could have substantiated their alibi; by the irrevocable loss of inmate witnesses known to the defendants only by prison 'nicknames' now long-since transferred to other institutions or released from custody altogether; and by the deterioration of physical evidence essential to corroborate the defendants' testimony and to rebut the evidence against them."

Id. at 1125 (emphasis supplied).

Under the standards set forth in Valenzuela-Bernal, and given the circumstances of this case, this finding of "substantial prejudice" went further than

necessary and is therefore sufficient to justify dismissal of the indictments on both Fifth and Sixth Amendment grounds.*

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* For purposes of the respondents' Fifth Amendment claim of undue pre-indictment delay, the Court must also take into account in assessing prejudice the separate question of the oppressive manner of respondent's confinement during the period of delay. It is established law for purposes of post-indictment delay analysis under the Sixth Amendment that one factor that must be considered is "oppressive pretrial incarceration." See United States v. Valenzuela-Bernal, 458 U.S. at 869 (quoting United States v. MacDonald, 435 U.S. 850, 860 (1977) and Barker v. Wingo, 407 U.S. 514, 532 (1972)). This factor is not at issue in the customary pre-indictment delay claim under the Fifth Amendment because such delay normally occurs at a time that the ultimate defendant is at liberty, or at least is not confined by virtue of the pendency of investigation. Respondents are in the unusual posture of having been subjected to oppressive pretrial incarceration in advance of any indictment, thus triggering the applicability of the Sixth Amendment analysis to their Fifth Amendment claim. There can be little dispute that respondents' placement in solitary confinement for more than nineteen months, with all the terri-

(Footnote continued)

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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ble conditions such confinement entails, constitutes "oppressive pre-trial incarceration."